

Section 8: North Dakota State Employee Defense

This section discusses the statutory protections against liability and defense provided to State employees through the North Dakota State Tort Claims Act, N.D.C.C. ch. 32-12.2.

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Quick Tips

When you are served with a legal document such as a Summons and Complaint

- ☐ **Immediately** contact and forward all documents you were served with to:
 - Attorney General's Office
 - Your agency head, and
 - Risk Management Division
- ☐ Execute and forward the form requesting legal defense to:
 - Your agency head,
 - Office of the Attorney General, and
 - Risk Management Division

If you decide to hire an attorney other than the attorney hired by the Risk Management Fund to represent you in the lawsuit

- ☐ **Immediately** contact the attorney of your choice as that attorney has a limited time to file an Answer on your behalf.
- ☐ Note that hiring your own attorney waives the representation and indemnification provided under State law.

When working with attorney hired by the Risk Management Fund

- ☐ Provide
 - Complete disclosure
 - Cooperate fully
 - Discuss the matter only with attorneys and adjusters hired by the State
 - Refer all questions concerning the action to the assigned attorney, the Office of the Attorney General or Risk Management Division

8.1 Introduction

This section will discuss defense protections provided to State employees under the State Tort Claims Act (Act) as well as explain the State employee's obligations in the defense of claims or lawsuits. The limits of liability established by the Act may not apply to actions in Federal Court or courts in states other than North Dakota. However, the employee defense provided by the Act pertains to a suit brought in any court.

In order to accurately describe the defense protections and obligations under the Act, it is necessary to define certain terms.

Definitions:

1. "State employee" means every present or former officer or employee of the State or any person acting on behalf of the State in an official capacity, temporarily or permanently, with or without compensation. The term does not include an independent contractor.
2. "Scope of employment" means the State employee was acting on behalf of the State in the performance of duties or tasks of the employee's office or employment lawfully assigned to the employee by competent authority or law.
3. "Claim" means any claim for money damages brought against the State or a State employee for an injury caused by the State or a State employee acting within the scope of the employee's employment whether in the State or outside the State.
4. "Injury" means personal injury, death, or property damage.
5. "Punitive damages" means damages awarded in addition to compensatory damages to serve as punishment for wanton misconduct or as a deterrent to others.

Publications:

Reference material available on the Risk Management web site under Publications includes:

- [Liability of State Employees in North Dakota](#)
- [Preparation for Testifying Guidelines](#)
- [What to Expect If You Get Sued: A Litigation Handbook for ND State Employees](#)

8.2 Safeguards Provided to and Obligations Required of State Employees

- **N.D.C.C. 32-12.2-03(6)** provides that the State will defend a State employee in connection with any civil claim or demand, whether groundless or otherwise, arising out of an alleged act or omission occurring within the scope of employee's employment if the employee provides complete disclosure and cooperation and requests such defense in writing.

This section explains that the determination of whether or not the employee was acting within the scope of the employee's employment will be made by the attorney general. The head of the State entity that employs the State employee will advise the attorney general as to whether that person deems the employee's actions that are the subject of the action to have been within the scope of the employee's employment.

The employee must provide complete disclosure and cooperation in the defense of the claim or demand and the employee must give written notice of the claim or demand to the head of the State entity that employs the State employee and the attorney general within ten days after being served with a summons, complaint or other legal pleading asserting that claim or demand against the State employee.

The disclosure and cooperation requirement is not a new one. The requirement that the employee is required to provide complete disclosure and cooperation in the defense of a claim was taken verbatim from N.D.C.C. Section 26.1-21-10.1. That statute was repealed by the 1997 Legislature in conjunction with transferring the cost and requirement for employee defense into the Tort Claims Act, N.D.C.C. ch. 32-12.2.

Protection: In order to protect the State and the employees who properly perform their job functions, this section provides the basis for determining whether or not the employee was functioning within the scope of their employment. The State should not be required to defend an employee who performs an obviously illegal or egregious act.

The requirement that the State employee provide complete disclosure and cooperation in the defense of the claim will ensure the employee and the State are provided appropriate representation. By meeting this requirement, the Attorney General's office and the Risk Management Fund will be able to correctly identify which claims should be settled and how best to defend a case, if appropriate. This requirement does not mean that should an employee inadvertently make a minor mistake in providing "complete disclosure and cooperation" defense for that employee would be barred. However, refusal to provide information or participate

in the process, or making a significant misrepresentation of the facts, would result in the State barring representation and indemnification.

Obligation: First and foremost, State employees should follow all policies and procedures established for the proper performance of their job functions. Unfortunately, such conduct will not guarantee that the employee will not be named as a defendant in a lawsuit arising out of that employee's activities.

If an employee is named as a party in a lawsuit, it is necessary for the employee to notify the head of his or her employing agency and the Office of the Attorney General within 10 days of being served with any legal document asserting a legal claim against the employee. Typically, this claim would be in a Summons and Complaint, which are served on the State employee personally or by certified mail.

Under the rules of the courts in North Dakota, a defendant only has 20 days to file a written response with the court when served with a Summons and Complaint. That is a relatively short period of time for the Risk Management Fund and the Attorney General's office to investigate the matter, discuss it with the State employee and the agency head, determine which attorney the matter should be assigned to, give that attorney time to become familiar with the matter, and for the attorney to prepare the appropriate legal response. Accordingly, even though this statute allows State employees 10 days in which to advise the Office of the Attorney General that they have been served with a legal pleading, we recommend employees make every effort to **IMMEDIATELY** notify their supervisor, the agency head and the Office of the Attorney General.

To assist employees in meeting the 10 day requirement to request representation by an attorney hired by the Fund, the State Tort Claims Act was revised to require at N.D.C.C. Sec. 32-12.2-04(5) that a person bringing a legal action against the State or a State employee for a claim shall deliver a copy of the legal pleading in which the claim is first asserted in the action to the director of OMB at the time the legal pleading is served in the action. This will give the Risk Management Division the opportunity to contact the state employee to assist the employee if it is the employee's intention to request to be defended by the Fund.

- **N.D.C.C. 32-12.2-03(7)** concerns what happens if a State employee hires separate defense counsel to represent them for any claim brought under the Tort Claims Act.

The Risk Management Fund, working with the office of the Attorney General, will determine which attorney has the expertise to best serve as counsel for the Fund to represent State employees who are served for actions covered by the Fund. The attorney must qualify as and be appointed a Special Assistant Attorney General; must agree to accept compensation in accordance with the Special Assistant Attorney General Billing Policy; and must comply with the Conduct of Litigation

requirements established by the Attorney General's office. By requiring attorneys hired by the Fund to comply with these requirements, the Attorney General and the Fund will be in a position to monitor the litigation on behalf of the employee, the State, and the Risk Management Fund.

A State employee may choose to hire his or her own attorney and not be represented by an attorney retained by the Risk Management Fund. If so, the State will **not** pay a judgment entered against the employee as the result of that claim, nor reimburse the employee for defense costs.

Protection: This provision allows an employee to select an attorney of his or her choice should the employee choose not to be represented by the attorney hired by the Risk Management Fund. However, it encourages employees to agree to representation by an attorney hired by Risk Management. Using those attorneys helps ensure high quality legal representation and reasonable legal costs, as well as consistent legal positions. This benefits State employees and the Risk Management Fund.

Obligation: If an employee chooses to retain an attorney other than the defense counsel hired by the Risk Management Fund, the employee will be required to pay any and all defense costs associated with the claim or lawsuit as well as any resulting settlement or judgment. The Risk Management Fund will **not** reimburse the employee for those costs.

- **N.D.C.C. 32-12.2-02(1)** provides that only the State may be held liable for money damages for an injury proximately caused by the negligence or wrongful act or omission of a State employee acting within the employee's scope of employment.

And,

- **N.D.C.C. 32-12.2-03(1)** provides that an action for an injury proximately caused by the alleged negligence, wrongful act, or omission of a State employee occurring within the scope of the employee's action must be brought against the State.

Protection: These provisions require the suit for damages be brought against the State rather than the State employee. In the event an employee is named as a defendant in a lawsuit and it is claimed the employee was acting within the scope of employment, the Fund will request the employee be dismissed from the action.

Obligation: If the motion to dismiss the named employee is successful, the employee would still be obligated to cooperate in the defense of the action as

described in the *Obligation* section of 32-12.2-03(6) on page 8.2-1 of this section.

- **N.D.C.C. 32-12.2-03(3)** provides a State employee is only liable in the employee's personal capacity for acts or omissions of the employee occurring outside the scope of the employee's employment. The statute goes on to require that the plaintiff bear the burden of proof to show by clear and convincing evidence that the employee was acting outside the scope of the employee's employment.

Protection: By providing that employees are only liable for actions outside the scope of employment, the State has obligated itself to pay for damages when employees are performing their job functions as directed. This provision would require the party bringing an action against a State employee in his or her "personal capacity" to prove an employee was not performing his or her job function, or was doing so in a reckless or intentionally wrongful manner, when the event resulting in the claim or lawsuit occurred. Therefore, if an employee is performing that employee's job, as directed, the employee should not be ordered to pay a judgment.

Obligation: All State employees should review the standard operating procedures and policies that pertain to their position to ensure they are performing their functions as authorized and required; and that those policies and procedures are up-to-date and applicable. By not performing assigned tasks as directed, employees may create liability through their actions.

- **N.D.C.C. 32-12.2-03(4)** provides that the State will indemnify and save harmless a state employee for any claim, whether groundless or not, and for any final judgment for any act or omission occurring within the scope of employment of the employee other than for punitive damages.

And,

- **N.D.C.C. 32-12.2-03(2)** provides that a State employee is not *personally* liable for money damages for an injury when the injury is proximately caused by the negligence, wrongful act, or omission of the employee acting within the scope of employment.

Protection: The term "save harmless" means that the State will pay defense costs to defend the claim or lawsuit. (Note the exceptions to this provision discussed at 32-12.2-03(6) on pages 8.2-1 and 8.2-2.)

The term "indemnify" means that if a judgment should be entered against a State employee, the State will pay the judgment.

The State Tort Claims Act's exclusions to liability discussed at N.D.C.C. 32-12.2-02(3) below, as well as the caps on damages established in N.D.C.C. 32-12.2-02(2), may not apply to an action brought under federal law or the law of another state. Accordingly, in one of those instances, a State employee could be found liable for an action within the scope of employment, which could result in a judgment being entered against that State employee. If that were to occur, this provision requires the State, through the Risk Management Fund, to pay that judgment amount.

Obligation: The employee would be obligated to cooperate in the defense of the action as has been explained at 32-12.2-03(6).

- **N.D.C.C. 32-12.2-03(5)** provides that a judgment in a claim against the State is a complete bar to any claim by the claimant, resulting from the same injury, against the employee whose act or omission gave rise to the claim.

Protection: This provision means that once a claim or lawsuit is settled, either prior to a legal action being commenced or as the result of a judgment by the court or a jury, the claimant cannot attempt to recover damages against the state employee in a separate claim or lawsuit.

Obligation: As referenced above, the State employee is required to provide complete disclosure and cooperation in the defense of the claim.

8.3 How Does a Lawsuit Evolve

State Court Lawsuits. Most lawsuits that allege a party was damaged or injured due to negligence on the part of a state employee are venued in a State District Court, usually in the County in which the incident occurred.

Tort Caps. Under the State's Tort Claims Act (N.D.C.C. ch. 32-12.2) the amount an injured party can collect from the State in a State Court action is limited to \$250,000, even if the party can prove or is awarded a judgment in excess of \$250,000. If more than four people are injured as the result of one occurrence, the total amount they are able to recover collectively is \$1,000,000. These caps apply to lawsuits that are venued in State Court cases and might not apply to lawsuits brought in Federal Court or in courts of other states.

Notice Requirement. Before someone can bring a lawsuit in State Court, they are required by the N.D.C.C. ch. 32-12.2 to give notice of their potential claim to the Director of OMB within 180 days after the injury or damage is discovered.

Federal Court Lawsuits. The process of service of documents, motions, discovery, settlement negotiations, and trial are very similar to those in State Court. The main difference between the two systems is the type of lawsuits pursued in each. In order to avoid the limit of recovery under the State Tort Claims Act, a party may decide to file an action in Federal Court. However, those lawsuits are limited because the Eleventh Amendment of the U.S. Constitution prohibits lawsuits by individuals against the State (or State employees acting in their official capacity) in Federal Court. That is the reason we see many Federal actions brought against State employees in their individually capacity as well as their official capacity.

Common Federal Court lawsuits are those brought by employees against employers, supervisors, or fellow employees. They are referred to as Employment Practices Liability (EPL) cases. An allegation that a State employee violated someone's civil rights (discrimination, harassment) would probably be venued in Federal Court under federal statute 42 U.S.C. § 1983, commonly referred to as section 1983. This federal statute allows lawsuits against government representatives while acting on behalf of the government and, if successful, awards plaintiffs their attorney fees and costs.

The Evolution of a Lawsuit. The first step in suing a state employee would be to serve the employee with a Summons and Complaint either by a process server or by mail. If you are served with legal papers in which you are sued for something you did as a State employee or a State volunteer:

- Immediately give written notice of the lawsuit to the head of your agency and the office of the Attorney General;
- Send the Attorney General copies of all of the documents you received;

- If you are served by mail, do not sign and return the Admission of Service. Instead forward it along with the other documents to the office of Attorney General for handling;
- Request indemnification and defense from the State by completing the "[Request for Legal Defense and Indemnification](#)" form.

The Risk Management Fund will then hire an attorney to represent you. The first thing that attorney will decide is whether it is appropriate to file a motion with the Court requesting to have the lawsuit dismissed, or if it is more appropriate to file a document called an Answer on your behalf.

Motion to Dismiss. A Motion to Dismiss is filed if someone failed to file a 180 day notice with the Director of OMB, if an immunity exists (an exclusion from liability), or if the Complaint does not contain an allegation that could result in a finding of negligence against the State.

Under the N.D.C.C ch. 32-12.2, as well in other sections of the North Dakota Century Code, there are a number of "exclusions to liability" for the State or State employees' acts. If the Complaint only contains allegations for which statutes provide there can be no liability on the part of the State or a State employee, the attorney will file a motion with the Court asking the Court to dismiss the action *as a matter of law*. If a Motion to Dismiss is successful, the lawsuit is over unless there is an appeal.

Answer. In those cases where a Motion to Dismiss is not appropriate, within 20 days of the State employee being served with the legal papers, the attorney will file an Answer with the Court responding to the allegations in the Complaint.

Discovery. The period of time after a Summons and Complaint is served and before the trial is held when each party requests information and documents from the other side in an attempt to "discover" pertinent facts. Generally discovery devices include interrogatories, depositions, requests for admissions, and document production requests. Discovery helps a party find out the other side's version of the facts, what witnesses know, and other evidence. Rules dictating the allowable methods of discovery have been set up by Congress for the Federal courts and by state legislatures for State courts.

Interrogatories. Written questions that are to be answered under oath. The information contained in Interrogatories may be used during trial.

Depositions. A Deposition is an oral statement made under oath of a party, an expert, or a witness involved the lawsuit. The information obtained in a Deposition can be used during trial.

Motion for Summary Judgment. If, after the completion of the discovery process, the attorney representing the State and the State employee feels there is no indication of negligence on the part of the State, the attorney will file a Motion with

the Court asking the Court to dismiss the Complaint and not allow the matter to proceed to trial. If the Court agrees that there is no basis for negligence, the matter will be dismissed.

Settlement. If, through the discovery process, it is discovered that there are issues that may lead a jury to determine some negligence on the part of the State or the State employee, settlement discussions would probably be held between the parties. If a settlement can be reached that both parties feel is fair, the matter will be dismissed by the Court. A settlement is not an admission of guilt. Often times it is just an agreement that benefits both parties.

Trial. If the matter cannot be settled between the parties, a trial is held and the verdict of the jury or, if tried to the Court, the judge resolves the matter.

Appeal. If one of the parties involved in the lawsuit feels the trial court decision was not fair and in error, the matter could be appealed to the North Dakota Supreme Court if it is a State court action. The decision of that Court is final.

8.4 Discussion

It is impossible for the governing statute to address all questions concerning employee defense. The Risk Management Division has developed certain procedures for handling those situations not precisely addressed in the Tort Claims Act. For example:

- √ The Tort Claims Act provides indemnification for employees acting within the scope of employment. It is the Fund's position that if a money judgment is entered by a court, and the court determines the employee's actions are outside the scope of employment, that judgment cannot be paid by the Fund.
- √ With regard to providing employee defense, if the State agreed to provide defense and it was later determined that the employee was not acting within the scope of employment, whether the State would continue to defend the employee would depend on the facts.

We can foresee circumstances in which the State would discover important facts establishing that the State employee's actions were outside the scope of employment and that continued representation of the employee would not be appropriate. In that case, the State would terminate representation but would take all actions required by applicable ethical principles to protect the State employee's interests while the employee acquires separate representation.

On the other hand, there are other circumstances in which the State may continue representation even after a court has determined that the State employee acted outside the scope of employment, although the State would not be required to do so. For example, if the State believed a court had erroneously found that a State employee had acted outside the scope of employment, the State would continue to represent the State employee in an appeal of that decision.

- √ Would a State employee be entitled to hire his or her own attorney if he or she originally requested representation by the Fund and then later decided to hire independent counsel?

State employees are always entitled to hire whomever they would like to represent them. However, 32-12.2-03(7) provides that employees forfeit their right of indemnification and defense under the Fund when they chose to retain private counsel.

- √ If an employee hires private counsel to represent him or her and later requests representation by the Fund, would it be available to him or her then?

N.D.C.C. Section 32-12.2-03(4) requires an employee to request representation within ten days of being served with a legal pleading. Therefore, unless the request is made within this ten-day period, the State would not be *required* to provide the representation.

However, it is possible that in appropriate circumstances the Fund would waive the ten-day requirement and agree to provide the representation at a later time. Any such request would be decided based on whether or not it is in the State's best interest to waive the requirement.

8.5 Request for Legal Defense

The [*Request for Legal Defense*](#) form that follows this Section has been developed to assist an employee to meet the requirements set out at N.D.C.C. 32-12.2-03(6). The information presented on pages 8.2-1 and 8.2-2 of the Manual explains that if a State employee is named as a party to a lawsuit and the employee seeks to be indemnified and defended by the State, the employee must request such defense in writing within ten days after being served with a summons, complaint, or other legal pleading.

It is recommended that, should you be served with a legal pleading, you **immediately** notify your agency head, the Solicitor General at the Office of the Attorney General, and the State Risk Manager. Tell them that you have been served; arrange to provide a copy of all of the materials served upon you to them; and, if you wish to be defended and indemnified by the State, advise them that you will be forwarding a signed *Request for Legal Defense* as soon as possible and, in any event, within the ten day period following the service. If you have any questions concerning this procedure, contact the State Risk Manager for direction.

**REQUEST FOR LEGAL DEFENSE
AND INDEMNIFICATION PURSUANT
TO N.D.C.C. ch. 32-12.2**

On _____, I was served with a copy of legal pleadings in the matter of:

_____,
in which a claim is asserted against me as a state employee. A copy of the pleading served on me is attached.

The allegations against me in this suit pertain wholly to activities within the scope of my employment.

Pursuant to N.D.C.C. 32-12.2-03(6), I hereby request: 1) legal representation in this matter by an attorney hired by the Risk Management Fund and 2) indemnification by the state of North Dakota.

I promise to provide to the attorney assigned to represent me and/or the State of North Dakota, complete disclosure of all facts known to me or learned by me and I further promise to cooperate fully with the attorney(s) hired by the State in the defense of this lawsuit.

I have read, understand and agree to the foregoing conditions of representation by the Risk Management Fund and the state of North Dakota.

Dated this _____ day of _____.

Signature

Telephone Numbers:

Work: _____

Home: _____

FAX: _____

Within 10 days of being served, send to:

**The Office of the Attorney General
900 East Boulevard
Bismarck, ND 58505-0041
Phone: 701-328-3640; FAX 701-328-4300**

The Head of Your Employing Agency

and to:

**Division of Risk Management
Century Center
1600 East Century Ave, Suite 4
Bismarck ND 58503-0649
Phone: 701-328-7584; FAX 328-7585**